Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

JACOB S. THOMAS,

Petitioner,

-v-

COMMISSIONER, STATE OF NEW YORK OFFICE OF MENTAL HEALTH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1- Whether petitioner was deprived of property without due process of law, when the State Supreme Court invoked and the Appellate Division sustained the defense of laches when it had not been raised in the notice of motion as an objection in point of law, in violation of the Fourteenth Amendment?

2- Whether petitioner was deprived of property without due process of law, when the Appellate Division found unsupported new findings of fact from a pleading in a federal civil rights action, to construct a demand and refusal scheme to support its Statute of Limitations ruling, in violation of the Fourteenth Amendment?

3- Whether petitioner was deprived of property without due process of law, by the NYS Court of Appeals practice that allowed wrongly applied motion defenses, to defeat a right of appeal and thus preclude a review of petitioner constitutional right to a pre-termination hearing pursuant to NYS Civil Service Law § 75.1(b), in violation of the Fourteenth Amendment?

4- Whether petitioner was deprived of property without due process of law, when the NYS Court of Appeals refused to review, pursuant to article VI § 3 (a) of the NYS Constitution, the sufficiency of the new findings of fact the Appellate Division relied on when modifying the State Supreme Court final judgment, in violation of the Fourteenth Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

PROCEDURAL HISTORY 4

REASONS FOR GRANTING THE PETITION 6

I. Preliminary Statement 6

II. The Appellate Division and State Supreme Court Unsettled the Body of Law Governing Motion Practice and Laches and Erred by Invoking the Defense of Laches When Such Defense Was Not Raised in the Motion to Dismiss 8

III. The Appellate Division's New Findings Regarding the Federal Court Pleadings as Creating a Demand Refusal Scheme Sufficient to Trigger Application of the Four Month Statute of Limitations Was Error 12

Page

IV. Petitioner's Right to Due Process Has Been Denied by the Courts Below 15

CONCLUSION 19

APPENDIX A - Opinion of New York State Court of Appeals dated January 10, 2002 ..... 1a

APPENDIX B - Opinion of New York State Court of Appeals dated September 20, 2001 ..... 2a

APPENDIX C - Opinion of State Supreme Court, Appellate Division, Third Department entered June 7, 2001 ..... 4a

APPENDIX D - Opinion of State Supreme Court, County of Albany, entered August 18, 2000 ..... 8a

TABLE OF AUTHORITIES

Cases	Page
Baron v. Mackreth, 27 AD2d 661 (2nd Dept 1967)	11
Catone v. Spielmann, 966 F. Supp., 1288 (NDNY 1997)	15
Cleveland Board of Education v. James Loudermill, 470 U.S. 532	15
Community Bd. No. 3 v. State of New York, Off. of Mental Retardation & Developmental Disabilities, 76 AD2d 851	12
Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246	18
Davis v. Wechsler, 263 U.S. 22	19
Dental Society of New York v. Cary, 92 AD2d 263, 461 NYS2d 1089 (4th Dept 1960)	11
Devens v. Gokey, 12 AD2d 135, *affd* 10 NY2d 898	10
Flomenbaum v. Drug Abuse Control Comm., 50 AD2d 20, 377 NYS2d 211 (3rd Dept 1975)	15, 16
Galway v. Metropolitan RR. Co., 128 NY 132 (1891)	11
Hassett v. Barnes, 11 AD2d 1089 (4th Dept 1960)	9, 11
Hathorn v. Lovorn, 457 U.S. 255	16

Page

International Longshoremen's Assn', AFL-CIO v. Davis, 476 U.S. 380-393 17

Johnson v. Director, Downstate Medical Center, 52 AD2d 357 (2nd Dept 1976), *affd*, 41 NY2d 1061 (1977) 15, 16, 19

Meegan v. Griffin, 161 AD2d 1143 (4th Dept 1990) 11

Nahodil v. United States of America, 36 F3d 323 (3d Cir. 1994) 11

NAACP v. State of Alabama, 357 U.S. 449 17

Ramanadhan v. Wing, 174 Misc.2d 11, 662 NYS2d 393 (1997) 19

Rubin v. Rubin, 72 AD2d 536, 421 NYS2d 68 (1st Dept 1979) 11

Schubtex, Inc. v. Allen Snyder, Inc., 49 NY2d 1, 5, 424 NYS2d 133 (1979) 14, 16, 17

Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (1956) 19

Solomon R. Guggenheim Found. v. Lubell, 77 NY2d 311, 569 N.E.2d 426 567 NYS2d 623 (1991) 9

Street v. New York, 394 U.S. 576 ..... 16, 18

Page

Tibury Fabrics, Inc. v. Stillwater, Inc., 81 AD2d 532, 438 NYS2d 82 (1st Dept), *affd*, 56 NY2d 624, 450 NYS2d 478, 495 NE2d 1093 (1982) 11

Tumey v. State of Ohio, 273 U.S. 510 ..... 16, 18

Ward v. Love County, 253 U.S. 17 ..... 17, 18

Westervelt v. Gregg, 12 NY 202 (1854) 18

Statutes:

6 NY Jur 2d, Article 78 and Related Proceedings, § 154, at 283-284 9

24 Carmody-Wait 2d, NY Prac § 145:201, at 409 ..... 12, 16

24 Carmody-Wait 2d, NY Prac § 145:212, at 420 9

McLaughlin, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR § 217(1) 15

Weinstein-Korn-Miller, CPLR Manual, § 15.03 (b) at 15-20 18

OPINIONS BELOW

The last opinion of the NYS Court of Appeals (App. A, *infra*, 1a) is unreported. The first opinion of the NYS Court of Appeals (App. B, *infra*, 2a-3a) is reported at 96 N.Y.2d 935. The opinion of the State Supreme Court, Appellate Division, Third Department (App. C, *infra*, 4a-7a) is reported at 284 A.D.2d 627, 725 N.Y.S.2d 749. The opinion of the State Supreme Court, County of Albany (App. D, *infra*, 8a-13a) is unreported.

JURISDICTION

The NYS Court of Appeals entered its judgment on January 10, 2002 (App. A, infra, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment § 1 to the U.S. Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law...."

2. Article I § 6 to the NYS Constitution states, in pertinent part, as follows:

> "No person shall be deprived of life, liberty or property without due process of law."

3. Article VI § 3 (a) to the NYS Constitution, states in pertinent part, as follow:

> The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered.

4. NYS Civil Service Law § 75.1 (b) states in pertinent part that a person who is a honorably discharged wartime veteran from the armed forces of the United States:

> "....shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section."

5. NYS Civil Practice Law and Rules (CPLR) § 217 (1) states in pertinent part, as follows:

> ".... a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent`s refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty...."

6. NYS Civil Practice Law and Rules (CPLR) §3211 (a) (5) states in pertinent part, as follows:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, Statute of Limitations, or statute of frauds.

7. NYS Civil Practice Law and Rules (CPLR) § 7804 (f) states in pertinent part, as follow:

> The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer.

8. NYS Civil Practice Law and Rules (CPLR) § 2214 (a) states in pertinent part, as follow:

> A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor.

PROCEDURAL HISTORY

Petitioner is an honorably discharged veteran of the United States Air Force and served during the Vietnam War (R19)[1]. He began his career with the State of New York on March 6, 1969 (R27-34). His tenure with the Office of Mental Health began on October 5, 1995, with a permanent appointment to the position of Director of Facility Administrative Services 2 at Kingsboro Psychiatric Center, Brooklyn, New York (R6, at ¶ 4). In October 1996, the position was reclassified to Deputy Director of Psychiatric Center 2. Petitioner was reassigned upon returning from four months of medical leave, against his will, to the New York City Field Office (NYCFO) on November 10, 1997 (R165-166). On July 16, 1998, petitioner commenced a Title VII[2] action in the United States Court for the Eastern District of New York against respondent contending that the reassignment to the NYCFO violated Title VII (R239-246). Petitioner was terminated on March 17, 1999, without a pre-termination hearing pursuant to Civil Service Law §75.1 (b) and during the pendency of the Federal civil rights litigation (R17). A trial was held on March 6 and 7, 2000, and a judgment was entered on March 27, 2000, in favor of respondent (R217).

Petitioner made a demand for a pre-termination hearing via letter dated February 25, 2000 (R20). Respondent

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[1] Numbers in parenthesis preceded by letter "R" refers to pages in the RECORD ON APPEAL.

[2] *Title VII of the Civil Rights Act of 1964, as codified,* 42 U.S.C. §§2000e to 2000e-17 (*amended in* 1972, 1978 *and by the Civil Rights Act of 1991, Publ. L. No.* 102-166)

refused the demand for a pre-termination hearing via letter dated March 10, 2000, stating that the ". . . . position of Deputy Director is not among those for which Civil Service Law, Section 75.1 (b) accords tenure and due process protection under certain circumstances" (R21). Petitioner commenced an CPLR Article 78 (article 78) proceeding by service of a notice of petition, a petition, and a supporting affidavit on May 19, 2000 (R11, 13, 23). Respondent's notice of motion and supporting memorandum of law was served on June 9, 2000 (R51, 219). Respondent's notice of motion to dismiss, pursuant to CPLR §3211 (a) (5), raised solely objections in point of law based on Statute of Limitations and res judicata. Petitioner served a reply to respondent's motion to dismiss with a supporting affidavit on June 15, 2000 (R228, 235).

A Decision/Order (judgment) at the State Supreme Court was rendered by the Honorable Thomas J. McNamara on July 31, 2000 (App. D, *infra*, 8a). The judgment granted respondent's motion to dismiss the petition. The court in dicta discussed merit issues which were not before it concerning the petitioner's right to a hearing (App. D, *infra*, 9a-10a). The court went on to hold that because petitioner had delayed in requesting a hearing and demanding reinstatement, the proceeding was . . . "so late as to bar any right to a hearing petitioner may have had" (App. D, *infra*, 12a). The court decision is a laches ruling based on a mandamus to review proceeding.

A timely appeal was taken to the Appellate Division, Third Department (R3-4). The Appellate Division correctly ruled that an article 78 proceeding in the nature of mandamus to compel is the appropriate remedy for a discharged employee who claims entitlement to, but did not receive,

a pre-termination hearing. The court was also correct in opining that the Statute of Limitations runs from the date the demand is refused. The court found that petitioner was guilty of laches. The court also made a just in case "... [State] Supreme Court erroneously relied upon laches..." ruling and found that petitioner was guilty of a Statute of Limitations violation based on new findings of fact from federal court pleadings. The new findings of fact caused a modification of the lower court ruling that resulted in the dismissal of the petition on a Statute of Limitations violation.

The NYS Court of Appeals denied petitioner a right of appeal on the ground of the absent of a direct involvement of a substantial constitutional question in the Appellate Division's order. The court also denied petitioner's motion for leave to appeal.

REASONS FOR GRANTING THE PETITION

I. PRELIMINARY STATEMENT

The Supreme Court should grant this petition because petitioner, an honorably discharged veteran, is seeking to enforce his constitutional right to a pre-termination hearing pursuant to Civil Service Law §75.1 (b), which right has been denied him by errors of law and due process of law at the courts below.

Petitioner commenced an article 78 proceeding to compel a pre-termination hearing in accordance with Civil Service Law § 75.1 (b). Treating this article 78 proceeding as a mandamus to review case the State Supreme Court determined that petitioner was guilty of laches, not a

Statute of Limitations violation. Treating this article 78 proceeding as one in the nature of mandamus to compel, the Appellate Division determined that petitioner was also guilty of laches. (Emphasis supplied.) However, the Appellate Division and State Supreme Court violated a fundamental rule of civil procedure by invoking the defense of laches even though such defense was not raised by respondent in its motion to dismiss. It has long been held that the defense of laches will not be considered unless properly raised by a party. The Appellate Division compounded this error by making novel findings concerning petitioner's federal civil rights litigation. The court held that the second amended complaint filed by petitioner and the answer of respondent in the federal civil rights action constituted a demand and refusal scheme thereby triggering the Statute of Limitations applicable to the mandamus to compel proceeding. While article 78 petitions have been so viewed, no court to our knowledge has treated federal civil rights pleadings in such a manner. Moreover, there was no support in the record for the Appellate Division's new findings of fact regarding the federal court complaint.[3] The Appellate Division erred in making unsupported new findings of fact regarding the federal court pleadings and in treating the federal court complaint as a demand and the federal court answer thereto as a refusal to support its Statute of Limitations ruling. Moreover, there was no dispute before the court as to the date petitioner demanded a pre-termination hearing pursuant to Civil Service Law 75.1 (b). (Emphasis sup-

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[3] Petitioner's argument in this regard is preserved, having been raised in Point 6 of the Jurisdictional Statement Pursuant to Rule 500.2 and having been raised in the Notice of Motion for Leave to Appeal at the NYS Court of Appeals.

plied.) At the State Supreme Court, the court and the parties were in agreement as to the demand date (R2, 20, 55).

The issues raised herein are novel and appropriate for review by this Court in that they are pure issues of law. The lower courts' ruling in this case unsettles law and well established rules regarding appellate review and motion practice. It has nation-wide significance because consistent appellate review and the proper application of the defenses of laches and the Statute of Limitations are essential elements of civil practice which impact upon numerous actions filed in our courts. Inconsistent appellate review and misapplication of these defenses should not be allowed to undermine petitioner's constitutional right to a pre-termination hearing. Guidance from this Court is necessary to ensure due process of law for petitioner and that rules governing appellate review and motion practice, the body of law regarding the modification of a final judgment, laches and the Statue of Limitations in particular, are followed.

II. THE APPELLATE DIVISION AND STATE SUPREME COURT UNSETTLED THE BODY OF LAW GOVERNING MOTION PRACTICE AND LACHES AND ERRED BY INVOKING THE DEFENSE OF LACHES WHEN SUCH DEFENSE WAS NOT RAISED IN THE MOTION TO DISMISS.

The Appellate Division and State Supreme Court dismissed this proceeding by invoking the defense of laches even though respondent never raised it and petitioner was deprived of an opportunity to specifically address that defense. On a motion to dismiss a petition,

courts may consider only those grounds specified in the notice of motion, so if laches is not specified therein, it is not available to respondent (*see, Hassett v. Barnes* 11 A.D.2d 1089 [4th Dept 1960]; CPLR §7804 [f]). It is well settled law that the laches defense depends upon an objection being made to the proceeding on that ground (24 Carmody-Wait 2d, NY Prac §145:212, at 420; 6 NY Jur 2d, Article 78 and Related Proceedings, §154, at 283).

The Appellate Division rejected petitioner's contention that the State Supreme Court had erroneously relied upon laches to dismiss the petition as untimely. The Appellate Division reasoned that "laches in the context of a mandamus proceeding has to do with the Statute of Limitation, not the equitable doctrine of laches." This is wrong. Laches in the context of a mandamus proceeding has to do with an unexcused delay in asserting a right (*see*, 6 NY Jur 2d, Article 78 and Related Proceedings, §154, at 284). The Appellate Division erroneously determined that since respondent's motion to dismiss was premised upon petitioner's failure to timely commence the article 78 proceeding, State Supreme Court properly invoked the defense of laches. Again, the court was mistaken. While it is true that respondent raised a defense of timeliness, that defense was the Statute of Limitations not laches (R51-52). State Supreme Court cannot select among defenses to invoke if they are not raised in the respondent's motion papers (*see*, CPLR §§ 3211 [a] [5]; 7804 [f]). Moreover, it is settled law that laches and Statute of Limitations defenses are separate objections in point of law (*see, Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 [1991]). Here, the Appellate Division is treating untimely as a defense. Untimely, per se, is not

a defense nor an objection in point of law. It is a descriptive term.

Further, the Appellate Division's use of the term "equitable doctrine of laches" in its ruling is misleading and inappropriate. The action of the Appellate Division is typical in this proceeding in that another issue was addressed that was not before the court. This is a phase that respondent raised and it has no bearing on this proceeding (see, respondent's brief at 16, Appellate Division). Petitioner has never asserted that the "equitable doctrine of laches" was applicable to this proceeding. The gravamen of petitioner's argument has been that the doctrine of laches cannot be invoked by the State Supreme Court, *sua sponte*, if it has not been raised in the motion to dismiss as an objection in point of law. That is true for the "equitable doctrine of laches" and the non-equitable doctrine of laches. In passing on the motion, State Supreme Court does not have discretion to manufacture its own objections in point of law (*see*, CPLR §3211(a)[5]) ("a party may move for judgment dismissing one or more causes of action * * *) (emphasis supplied).

Matter of Devens v. Gokey, (12 A.D.2d 135, *affd* 10 N.Y.2d 898), was cited by respondent and the courts below as authority for the doctrine of laches in a mandamus to compel proceeding. However, in *Devens v. Gokey, supra*, it should be noted that the defense of laches was properly raised as an objection in point in law. The defense of laches was not properly raised in this proceeding and should not have been relied upon by the courts below.

The use of the defense of laches herein unsettles the law and conflicts with cases, from the NYS Court of Appeals,

the Third Department and other Appellate Divisions, governing motion practice. Here, the Appellate Division reasoned that the defenses of laches and the Statute of Limitations are one in the same and to raise one in a mandamus proceeding automatically raises the other. However, it is well settled that a defense or an objection in point of law must be raised or it will not be considered by the motion court (*see, Hassett v. Barnes*, 11 A.D.2d 1089 [4th Dept 1960]; *Dental Society of New York v. Cary*, 92 A.D.2d 263, 461 N.Y.S.2d 77 [3rd Dept 1983]; *Rubin v. Rubin*, 72 A.D.2d 536, 421 N.Y.S.2d 68 [1st Dept 1979]; *Tilbury Fabrics, Inc. v. Stillwater, Inc.*, 81 A.D.2d 532, 438 N.Y.S.2d 82 [1st Dept], *affd*, 56 N.Y.2d 624, 450 N.Y.S.2d 478, 495 N.E.2d 1093 [1982]). The Appellate Division's ruling also conflicts with other aspects of the body of law governing application of the laches doctrine: *Nahodil v. United States of America*, 36 F3d 323, 328 (3rd Cir. 1994) (defense of laches inapplicable where a fundamental constitutional right is alleged to have been violated); *Baron v. Mackreth*, 27 A.D.2d 661 (2nd Dept 1967) (dismissal of petition on ground of laches reversed where no questions of fact regarding reasonable excuse for delay had been considered); *Meegan v. Griffin*, 161 A.D.2d 1143 (4th Dept 1990) (defense of laches inapplicable where the demand for relief sought is not discretionary but is mandated by law); *Galway v. Metropolitan RR. Co.*, 128 N.Y. 132 (1891) (defense of laches inapplicable where petitioner's demand for relief is to enforce a legal right).[4]

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[4] Petitioner's arguments in this regard are preserved, having been raised in Points I and II of Appellant's Brief at the Appellant Division.

III. THE APPELLATE DIVISION'S NEW FINDINGS OF FACT REGARDING THE FEDERAL COURT PLEADINGS AS CREATING A DEMAND REFUSAL SCHEME SUFFICIENT TO TRIGGER APPLICATION OF THE FOUR MONTH STATUTE OF LIMITATIONS WAS ERROR.

The Appellate Division determined that the petition was properly dismissed because of the applicable four month Statute of Limitations. The court recognized that in the context of a mandamus to compel proceeding a demand and refusal scheme was necessary to trigger application of the limitations period. The court then took the novel position that the second amended complaint and answer thereto in the Federal action constituted a demand and refusal scheme in the article 78 proceeding. The court cited *Community Bd. No. 3 v. State of New York, Off. of Mental Retardation & Developmental Disabilities*, 76 A.D.2d 851, 852) as authority for this analysis. However, the cited case does not hold that a complaint in a Federal action can be treated as a petition in the context of an article 78 mandamus to compel proceeding. *Community Bd. No. 3 v. State of New York, supra,* deals solely with activity between the parties within a common statutory administrative framework. It supports the proposition that when an objection is raised in a prior administrative proceeding pursuant to a Mental Hygiene Law §41.34, that objection in a subsequent article 78 proceeding may be deemed the demand and the answer thereto the refusal. The holding in *Community* is a limited exception to the applicable case law which provides that the petition, itself, in an article 78 mandamus to compel proceeding, may be treated as a demand and the answer thereto as a refusal for Statute of Limitations purposes (*see,* Carmody Wait 2d, NY Prac., §145:201 at 409). The petition

analysis has only been used when there was a dispute regarding the demand date. As noted in the Preliminary Statement above there was no dispute before the court as to when petitioner demanded a pre-termination hearing. At the State Supreme Court, the court and the parties were in agreement as to the demand date (R2, 20, 55). (Emphasis supplied).

The prior proceeding (Federal action) between the parties was a judicial proceeding, not an administrative proceeding. As a result there was no burden upon the respondent in the Federal action to perform a positive duty. With no burden upon respondent and different relief sought in the Federal action, the second amended complaint in the Federal action cannot be construed to be a petition consistent with the demand and refusal scheme under CPLR §217(1). Additionally, if the petition for relief in the Federal action could be constructed to be a petition in this mandamus to compel proceeding, then the relief sought in the proceedings should be the same? They are not the same.

The petition for relief language in the Federal action's second amended complaint is also taken out of context (R232, 233; *see*, Appellant's Brief at 14). In the Federal action the salient relief sought in the original, amended and second amended complaints filed was for petitioner to be reassigned/reinstated to Kingsboro Psychiatric Center or appointed to a comparable position in the Albany area with the duties petitioner performed before he was relocated to the New York City Field Office (R239-254). The relief sought in this proceeding is a pre-termination hearing pursuant to Civil Service Law §75.1(b). Civil Service Law §75.1(b) does not provide for reassign-

ment/reinstatement. At no time did petitioner demand a pre-termination hearing pursuant to Civil Service Law §75.1(b) in the Federal action. This is confirmed in respondent's brief at 18, wherein it is maintained that petitioner failed to raise his right to a pre-termination hearing (emphasis supplied). If petitioner failed to demand this right how can it now be constructed that respondent refused that right?

Further, respondent's answer to the second amended complaint does not indicate that it was a refusal in the context of a mandamus to compel proceeding's demand and refusal scheme (R277-285). There is no reference to rights pursuant to Civil Service Law §75.1 (b) or a pre-termination hearing in the second amended complaint nor the answer thereto. Therefore, the Appellate Division's new findings of fact regarding the federal court pleadings is not supported in the record and should have been reversed at the NYS Court of Appeals. *Schubtex, Inc. v. Allen Snyder, Inc.*, 49 N.Y.2d 1, 5, 424 N.Y.S.2d 133, 134-135 (1979).

This is the first opportunity for petitioner objections to the new finding of fact contained in the Appellate Division's order to be reviewed. The NYS Court of Appeals refused to review the new findings of fact, in violation of article VI § 3 (a) to the NYS Constitution. The Appellate Division's novel construction of the law to the effect that a complaint in the Federal action is tantamount to a petition in a article 78 mandamus to compel proceeding has not, insofar as can be determined, been passed upon by the Supreme Court nor other courts. Guidance from this Court is necessary to insure consistent appellate review and a sound application of the limitation period.

The lower court's application of the limitation period and the failure to review the modification of the final judgment at the appellate level herein has unfairly denied petitioner his day in court.

IV. PETITIONER'S RIGHT TO DUE PROCESS HAS BEEN DENIED BY THE COURTS BELOW.

Petitioner an honorably discharged wartime veteran has been deprived of his property right to a pre-termination hearing pursuant to Civil Service Law §75.1 (b) because of errors of law by the courts below. It is well established in law that Civil Service Law §75.1 (b) creates a property interest and that the due process clauses of the US and NYS Constitutions[5] forbids discharge absent a pre-termination hearing (*see, Cleveland Board of Education v. James Loudermill, 470 U.S. 532; Johnson v. Director, Downstate Medical Center*, 52 A.D.2d 357 [2nd Dept 1976], *affd*, 41 N.Y.2d 1061 [1977]; *Catone v. Spielmann*, 966 F. Supp., 1288 [NDNY 1997]).

A leading commentator has noted continued confusion with the construction of CPLR §217(1) in an article 78 mandamus to compel proceeding (*see*, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §217:1, at 673). Notwithstanding that confusion, it is settled law that the Statute of Limitations for an article 78 mandamus to compel proceeding is four months and begins to run when respondent refuses petitioner's demand (*see, Flomenbaum* v. *Drug Abuse Control Comm.*, 50 AD2d 20, 377 NYS2d 211 [3rd Dept

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[5] US Constitution, 14th Amendment §1 and the NYS Constitution, article I § 6.

1975]). Petitioner made a demand on February 25, 2000. Respondent refused petitioner's demand on March 10, 2000. Petitioner commenced an article 78 action on May 19, 2000. Petitioner met the time limitations requirement for the demand and refusal scheme pursuant to CPLR §217(1). (R231). The Appellate Division's novel approach (construction of a demand and refusal scheme from a Federal action) has unsettled the law and created a conflict with cases from another Appellate Division, the NYS Court of Appeals and the Third Department itself. (*See, Johnson v. Director, Downstate Medical Center, supra*; *Flomenbaum* v. *Drug Abuse Control Commission et al.,supra*). This determination has lead to a substantial injustice for petitioner. The novel construction of the Appellate Division, which was not supported by evidence in the record, constituted a denial of due process of law (see, *Hathorn v. Lovorn*, 457 U.S. 255, 261-265; *Street v. New York*, 394 U.S. 576; *Tumey v. State of Ohio*, 273 U.S. 510; *Schubtex, Inc. v. Allen Snyder, Inc., supra*).

At the core of the Statute of Limitations ruling is the new demand date (June 1, 1999) that was constructed by the Appellate Division to support its demand and refusal scheme. The petition analysis that was used has only been used when there was a dispute between the parties regarding the demand date (see, Carmody Wait 2d, NY Prac., § 145.201 at 409). There was no dispute before the court as to when petitioner demanded a pre-termination hearing. At the State Supreme Court, the court and the parties were in agreement as to the demand date [February 25, 2000] (R2, 20, 55). Inasmuch as there was no dispute the court's action was arbitrary, in violation of petitioner's due process rights.

The Appellate Division used the term untimely to describe the reason the petition failed at the State Supreme Court and at the Appellate Division. Untimely is not a defense and was not the reason the petition failed at both courts. The laches defense was the reason the petition failed at the State Supreme Court and laches and Statute of Limitations defenses were the reasons the petition failed at the Appellate Division. The use of untimely has masked the fact that the State Supreme Court judgment had been modified at the Appellate Division. This has served to preclude appellate review pursuant to article VI § 3 (a) of the NYS Constitution. The NYS Court of Appeals refused to review the Appellate Division's modified final judgment, in violation of petitioner's due process rights.

The NYS Court of Appeals' action of dismissing an appeal of right when the ground upon which it stand was not supported by the evidence in the record is a deprivation of due process of law, in violation of the Fourteenth Amendment. The action as applied was arbitrary and created a conflict with the court's action in *Schubtex, Inc. v. Allen Snyder, Inc., supra.* Even though petitioner has endured the ultimate workplace sanction, termination without pre-termination hearing rights after 29 years of superior state service, the NYS Court of Appeals refused to recognize that a direct substantial constitutional question was involved and that petitioner has suffered a grievous loss. In order to determine whether there are independent and adequate state grounds for the court decision the Supreme Court has made inquiry into sufficiency of asserted state grounds (see, *International Longshoremen's Assn', AFL-CIO v. Davis,* 476 U.S. 380-393; *NAACP v. State of Alabama,* 357 U.S. 449; *Ward v. Love*

County, 253 U.S. 17; *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246).

It is settled law that a motion must state specifically and concisely all of the relief sought by the movant (*Weinstein-Korn-Miller*, CPLR Manual § 15.03 [b] at 15-20). When the courts below invoked the defense of laches, petitioner's rights were prejudiced because of a lack of notice and an opportunity to specifically address the defense. The courts below failed to adhere to well-settled procedural safeguards governing motion practice. CPLR §§7804(f); 2214(a); 3211(a)(5). The lower courts' motion practice irregularities constituted a deprivation of petitioner's due process rights (see, *Tumey v. State of Ohio, supra*).

It has been further stated generally that "due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights" (*see, Westervelt v. Gregg*, 12 N.Y. 202 [1854]). The actions of the courts below in this proceeding have been arbitrary and inaccurate adjudication. They have ruled on issues not properly before the court[6] and have chosen not to address issues properly before the court. Some very fundamental errors of law, with constitutional underpinnings, were committed by the courts below in this proceeding and their actions to date has demonstrated a vested interest in maintaining courts' processes, not due process of law. This is wrong (see, *Street v. New York, supra; Tumey v. State of Ohio, supra*). Due process of law also imposes upon

---

[6] Other issues addressed but not properly before the courts below and not cited herein are discussed at Points 3, 4 and 5 of the Appellant's Brief at the Appellate Division.

courts a duty to foster fundamental fairness essential to the very concept of justice (*see, Ramanadhan v. Wing*, 174 *Misc*.2d 11, 662 N.Y.S.2d 393 [1997]). The actions of the courts below have unreasonably hindered the assertion of a federal right, in violation of US and NYS Constitutions. (*See, Davis v. Wechsler*, 263 U.S. 22; *Slochower v. Board of Higher Education of New York City*, 350 U.S. 551 [1956]; *Johnson v. Director, Downstate Medical Center, supra.*)

CONCLUSION

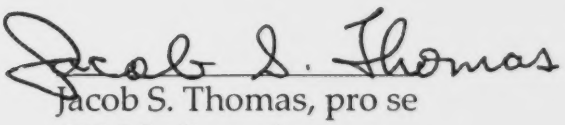
This proceeding is about the enforcement of petitioner's fundamental constitutional right to a pre-termination hearing prior to his termination by respondent on March 17, 1999. Respondent failed to perform a duty enjoined by law to provide petitioner a pre-termination hearing pursuant to Civil Service Law §75.1 (b). The courts below decision unsettles the law because it permits application of the defense of laches when said defense was not raised in respondent's motion to dismiss. The courts below addressed issues not properly before the court that were highly prejudicial to petitioner. The Appellate Division constructed a new demand date when the demand date was not in dispute. The new demand date was the foundation of the court's new findings of fact, regarding the federal court pleadings, but was not supported by the evidence in the record. The unsupported new findings of fact was improperly used to trigger the running of the Statute of Limitations which deprived petitioner of his day in court. The NYS Court of Appeals failed to review a modified final judgment pursuant to constitutional provisions, in violation of the U.S. and NYS Constitutions. To allow these misapplication of the law to stand fundamentally unsettles the law and alters rules and safeguards

which have been established for the protection of private rights and defeats justice.

For all the foregoing reasons, the Supreme Court should grant the petition.

Dated: Albany, New York
March 28, 2002

Respectfully submitted



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APPENDIX

Appendix A — Opinion of New York State Court of Appeals dated January 10, 2002

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at the Court of Appeals Hall in the City of Albany on the tenth day of January 2002

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

3-10 Mo. No. 1283
In the Matter of Jacob S. Thomas,
Appellant,
v.
James L. Stone, as Commissioner of the State of New York Office of Mental Health,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Appendix B — Opinion of New York State Court of Appeals dated September 20, 2001

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of September 2001

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1101 SSD 59
In the Matter of Jacob S. Thomas,
Appellant,
v.
James L. Stone, as Commissioner of the State of New York Office of Mental Health,
Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no appeal lies as of right from the unanimous order of the Appellate Division absent the

direct involvement of a substantial constitutional question (CPLR 5601).

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Appendix C — Opinion of State Supreme Court, Appellate Division, Third Department, entered June 7, 2001

State of New York
Supreme Court - Appellate Division
Third Judicial Department

Decided and Entered: June 7, 2001 88356

In the Matter of JACOB S. THOMAS,
Appellant,
v
JAMES L. STONE, as Commissioner of the State of New York Office of Mental Health,
Respondent.

MEMORANDUM AND ORDER

Calendar Date: March 29, 2001

Before: Crew III, J.P., Peters, Mugglin, Rose and Lahtinen, JJ.

Jacob S. Thomas, Albany, appellant in person.

Eliot Spitzer, Attorney-General (Lew Millenbach of counsel), Albany, for respondent.

Crew III, J.P.

Appeal from a judgment of the Supreme Court (McNamara, J.), entered August 18, 2000 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted respondent's motion to dismiss the petition as untimely.

Petitioner is the former Deputy Director of Psychiatric Center 2, a facility operated by the State Office of Mental Health. In 1997, petitioner was reassigned to another facility and, as a result, he commenced an action in Federal court against, among others, respondent, alleging that his reassignment was discriminatory in violation of the Civil Rights Act of 1964. During the pendency of that action, petitioner was terminated from his employment effective March 17, 1999. Petitioner thereafter amended his Federal complaint, asserting that his termination was retaliatory and demanding to be reinstated. Following the service of an answer, a trial ensued, at the conclusion of which the District Court ruled that petitioner's claims lacked merit.

In February 2000, petitioner requested a pretermination hearing in accordance with Civil Service Law § 75 (1) (b). On March 16, 2000, petitioner's request was denied, prompting petitioner to commence this CPLR article 78 proceeding seeking to compel respondent to reinstate him to the position of Deputy Director of Psychiatric Center 2. Respondent's motion to dismiss the petition upon the ground that the proceeding was barred by the Statute of Limitations was granted and this appeal ensued.

Petitioner contends that Supreme Court's reliance upon the defense of laches was erroneous as a matter of law inasmuch as respondent did not raise the defense as a basis for dismissal. We disagree. Laches in the context of a mandamus proceeding has to do with the Statute of Limitations, not with the equitable doctrine of laches (see, Matter of Devens v Gokey, 12 AD2d 135, 137, affd 10 NY2d 898). Inasmuch as respondent's motion to dismiss was premised upon, inter alia, petitioner's failure to timely commence this proceeding, Supreme Court quite properly considered whether petitioner was guilty of laches.

A CPLR article 78 proceeding in the nature of mandamus to compel is the appropriate remedy for a discharged employee who claims entitlement to, but did not receive, a pretermination hearing (see, Matter of De Milio v Borghard, 55 NY2d 216, 220). The Statute of Limitations for a discharged employee who has been denied a mandated hearing runs from the date that the demand for reinstatement was refused (see, id., at 220). However, the four-month Statute of Limitations for review of such an administrative determination cannot be frustrated by the simple expedient of delaying the demand for a hearing so as to toll the statute (see, Austin v Board of Higher Educ. of City of N.Y., 5 NY2d 430, 442). As a consequence, it has been held that a four-month period is the measure of permissible delay in the making of a demand (see, Matter of Amsterdam City Hosp. v Hoffman, 278 App Div 292, 297). Accordingly, petitioner had until July 17, 1999 to timely demand a pretermination hearing. As petitioner failed to make such a demand until February 2000, Supreme Court correctly determined that petitioner was

guilty of laches and that commencement of this proceeding was untimely.

Moreover, even assuming that Supreme Court erroneously relied upon laches to dismiss the petition as untimely, the petition nevertheless was properly dismissed as barred by the applicable four-month Statute of Limitations. It frequently has been recognized that the very service of a petition will be deemed a demand and an answer thereto a refusal (see, e.g., Community Bd. No. 3 v State of New York, Off. of Mental Retardation & Dev. Disabilities, 76 AD2d 851, 852). Consequently, petitioner's filing of the second amended complaint in his Federal action on June 1, 1999, which demanded reinstatement, constituted his demand and respondent's answer thereto constituted a refusal. As such, commencement of this proceeding approximately 11 months later was patently untimely.

Peters, Mugglin, Rose and Lahtinen, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

s/ Michael J. Novack

Michael J. Novack
Clerk of the Court

Appendix D — Opinion of State Supreme Court, County of Albany, entered August 18, 2000

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
JACOB S. THOMAS,

Petitioner,

DECISION AND ORDER

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules of the State of New York

Index No. 2774-00

-against-

RJI No. 01-00-ST0936

JAMES L. STONE, COMM/OMH,

Respondent.

(Supreme Court, Albany County, Special Term June 16, 2000)

(Acting Justice Thomas J. McNamara, Presiding)

APPEARANCES:

Jacob S. Thomas, Pro Se
409 Madison Avenue
Albany, New York 12210

Hon. Eliot Spitzer, Attorney General
(Robert A. Siegried, Esq., Assistant Attorney General)
Office of the Attorney General
The Capitol
Albany, New York 12224

McNamara, J.

Petitioner has brought this proceeding pursuant to CPLR Article 78 to compel respondent to provide him a pre-termination hearing and to reinstate him to his position in the Office of Mental Health as Deputy Director of Psychiatric Center 2. He was terminated from the position on March 17, 1999 and in a letter dated February 25, 2000, he demanded a hearing. In other letters dated April 24, 2000 and May 3, 2000, he demanded reinstatement to the position. The demand for a hearing was rejected in a letter dated March 10, 2000 on the basis that, he was not entitled to a due process hearing under Civil Service Law §75. The demands for reinstatement were rejected for the same reason in a letter dated May 16, 2000.

Respondent argues that under Civil Service Law §75 (1)(c) petitioner was not entitled to a hearing prior to being terminated because he served in a policy influencing position subject to the will of the Commissioner and that this proceeding is actually one to review the decision to terminate him. The four-month period of limitations governing mandamus to review starts to run when the determination becomes final and binding (Matter of Armstrong v Centerville Fire Co., 83 NY2d 936). As the termination was effective March 17, 1999 and the petition

was filed on May 19, 2000, if respondent is correct, the proceeding is untimely (CPLR 217).

Petitioner maintains that he was entitled to a hearing under Civil Service Law §75(1)(b) because he is an honorably discharged wartime veteran.

Civil Service Law §75(1)(c) provides that an employee holding a position in the non-competitive class, other than a position designated as confidential or requiring the performance of functions influencing policy, shall not be removed except after a hearing. However, under Civil Service Law §75(1)(b) an honorably discharged wartime veteran holding a permanent appointment in the classified service shall not be removed except after a hearing. Because at the time of his termination, petitioner had held the position of Deputy Director of Psychiatric Center 2 for longer than the probationary term (4 NYCRR §4.5[b]), his appointment was permanent (Marlow v Tully, 100 AD2d 786, affd 63 NY2d 918). And as an honorably discharged wartime veteran (see, Civil Service Law §85[1][c][4]) in a position in the non-competitive class of the classified service (Civil Service Law §42; 4 NYCRR Appendix 2 §2), he was entitled to a pre-termination hearing unless subdivision (1)(c) applies and is read to eliminate that right.

The position of Deputy Director of Psychiatric Center 2 has been designated by the Civil Service Commission as requiring the performance of functions influencing policy and so, the subdivision applies (4 NYCRR §2.2[c]; 4 NYCRR Appendix 2 §2). In addition, there is support for the argument that those in policy influencing positions in the non-competitive class are not entitled to a pre-termi-

nation hearing despite their status as honorably discharged wartime veterans (see, Matter of Conigland v Rosenblatt, 171 AD2d 864).

Despite the seeming conflict between the two subdivisions, the issue of petitioner's right to a hearing need not be resolved here.

An Article 78 proceeding, no matter what its nature, is the only remedy available to a terminated civil servant seeking reinstatement (Austin v Board of Higher Educ. of the City of N.Y., 5 NY2d 430). Where the aggrieved party is a wrongfully terminated permanent civil service employee seeking reinstatement, his remedy is by way of mandamus to compel the performance of a ministerial act enjoined by law (Matter of De Milio v Borghard, 55 NY2d 216). When that remedy is the appropriate form of relief, demand must be made upon the responsible officer to perform his duty and the limitations period (CPLR 217) begins to run from the date the demand was refused (Matter of De Milio v Borghard, supra, p. 220). An aggrieved employee, upon learning of his right to make the demand, must do so promptly (Matter of Devens v Gokey, 12 AD2d 135, affd. 10 NY2d 898). The limitations period will not indefinitely be extended by delay in making the demand (Austin v Board of Higher Educ. of the City of N.Y., supra), and unexcused delay will bar the proceeding (Matter of Devens v Gokey, supra).

Petitioner delayed more than eleven months in requesting a hearing and more than thirteen months in demanding reinstatement. Although petitioner was unsuccessfully pursuing federal civil rights litigation during a portion of that time, no reasonable excuse for the delay in demand-

ing reinstatement is offered and the demand here is so late as to bar any right to a hearing petitioner may have had (see, Matter of McKenzie v Comptroller of State of N.Y., 268 AD2d 828, thirteen month delay; Matter of Civil Serv. Empls. Assn., v Board of Educ., Patchogue-Medford Union Free School Dist., 239 AD2d 415, nine month delay; Matter of Rapess v Ortiz, 99 AD2d 413, nine month delay). Accordingly, the petition is dismissed.

This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Decision and Order, are being returned to respondent's attorney. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Saratoga Springs, New York
July 31, 2000

s/ Thomas J. McNamara
Thomas J. McNamara
Acting Supreme Court Justice

OFFICE OF
ALBANY COUNTY CLERK
ALBANY, N.Y.

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Papers Considered:

1. Notice of Petition dated May 18, 2000.
2. Petition sworn to the 17th day of May, 2000 with exhibits annexed.
3. Affidavit of Jacob S. Thomas in Support of Petition sworn to the 17th day of May, 2000 with exhibits annexed.
4. Affidavit of personal service sworn to the 24th day of May, 2000.
5. Notice of Motion dated June 8, 2000.
6. Affirmation of Robert A. Siegfried, Esq., dated June 8, 2000 with exhibit annexed.
7. Memorandum of Law in Support dated June 8, 2000.
8. Response to Respondent's Notice of Motion sworn to the 15th day of June, 2000.
9. Affidavit of Jacob S. Thomas in Support of the Response to Respondent's Notice of Motion sworn to the 15th day of June, 2000 with exhibits annexed.